BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

FERNANDO ESPINO Claimant	)	
VS.	)	Docket No. 1,058,654
TYSON FRESH MEATS, INC. Self-Insured Respondent	)	

ORDER

STATEMENT OF THE CASE

Respondent requested review of the September 26, 2012, Award entered by Administrative Law Judge (ALJ) Pamela J. Fuller. The Board heard oral argument on February 20, 2013. Scott J. Mann, of Hutchinson, Kansas, appeared for claimant. Abagail L. Pierpoint, of Kansas City, Missouri, appeared for the self-insured respondent.

The ALJ found claimant suffered an injury that arose out of and in the course of his employment and claimant's notice to respondent was timely. The ALJ awarded claimant a 5% functional impairment through September 19, 2011, a 78% work disability from September 20, 2011, through April 30, 2012, a 56.5% work disability from May 1, 2012, through June 12, 2012, and a 78% work disability thereafter.

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument before the Board, the parties stipulated that the Board may consider the deposition of Dr. Robert Barnett taken July 19, 2012.

ISSUES

Respondent argues claimant failed to prove he suffered an accidental injury that arose out of and in the course of his employment and failed to timely and properly report the alleged accidental injury. Respondent further argues the evidence does not support a finding of permanent impairment or a work disability.

Claimant argues the evidence shows he suffered an injury that arose out of and in the course of his employment; notice was timely; and he has a 5% impairment to the body

as a whole as well as an 83.5% work disability since the last date worked of September 20, 2011, based on a 67% task loss and a 100% wage loss.

The issues for the Board's review are:

1. Did claimant sustain an accidental injury that arose out of and in the course of his employment at respondent?

2. Did claimant give respondent timely and proper notice of the alleged accidental injury?

3. What is the nature and extent of claimant's alleged disability?

FINDINGS OF FACT

Claimant has worked for respondent since 2005. In the two years prior to the accident, he worked as a sticker. On April 7, 2011, claimant was injured when he was kicked by a cow and thrown against a wall. In the process, claimant dropped his knife and felt a pull or pop in his back when he bent over to pick up the knife. Claimant said he did not feel any pain that day but was warmed up from working and it was warm in the working area. Claimant felt pain the next morning. Claimant testified he told the supervisor about the problem a few minutes before starting work because he could not bend over. Claimant added he told the supervisor he had been kicked by a cow.

Claimant was sent to the plant nurse after reporting the injury. He was seen there on April 12, 2011, by Ida Aguilera, a registered nurse. Ms. Aguilera is fluent in Spanish, and she and claimant spoke in Spanish. Claimant told Ms. Aguilera that he felt a pull in the lower back area while performing his job duties as a sticker. Ms. Aguilera filled out an Injury/Illness Information form. She translated the information on the form to claimant, and claimant signed the form. Ms. Aguilera said claimant did not appear to have any difficulty understanding the information and did not tell her any portion of the form was incorrectly filled out. The form indicated that claimant felt a pull in the low back while performing the job duties of a sticker. Ms. Aguilera said if she had been told by claimant that he had been kicked by a cow, she would have included that on the Injury/Illness Information form. Claimant testified he told the plant nurse he had been kicked by a cow and does not know why that information was not included on the accident form. Claimant denied the form was explained to him and denied the plant nurse communicated with him in Spanish.

On April 18, 2011, claimant communicated to Ms. Aguilera that he wanted to see a doctor. Claimant was sent to Dr. Terry Hunsberger, an osteopathic physician. Dr. Hunsberger saw claimant for the first time in regard to the April 2011 injury on April 20, 2011. Claimant told Dr. Hunsberger he was a sticker at respondent and that he bent over while working and felt a pop in his back. Claimant did not tell Dr. Hunsberger of being kicked by a cow on April 7, 2011. Claimant said the pain did not start until about three

days later, which Dr. Hunsberger said was unusual. Dr. Hunsberger believed claimant would have had some muscle spasm and pain starting from the time he heard the pop in his back. In the examination report, Dr. Hunsberger noted that claimant had a slight restricted range of motion on flexion and extension of the lower back. Claimant's gait was normal.

Dr. Hunsberger next saw claimant on May 4, 2011. Claimant said the pain was worse and went across the back and down both legs. Claimant complained of pain on palpation over the lumbar spine. There was no muscle spasm. Claimant had good range of motion. Dr. Hunsberger ordered a lumbar spine x-ray that day, which was basically normal. Deep tendon reflexes did not show that claimant had nerve damage or a neurologic problem.

Dr. Hunsberger saw claimant again on May 18, 2011. Claimant told Dr. Hunsberger that his legs did not work in the mornings. Claimant continued to have low back pain that was sharp and radiated to both hips and legs. Claimant denied any numbness. Dr. Hunsberger found nothing objective to make him think claimant had weakness in the morning. Dr. Hunsberger recommended claimant have an MRI. Claimant had an open MRI on May 23, 2011, which showed claimant had a possible osseous contusion without associated significant compression deformity at L-2. Claimant had a minimal annular disc bulge and minimal compromise to the neural foramen at L4-5. The MRI also mentioned moderate facet joint arthrosis at L5-S1. Claimant has arthritis at L4-5 and L5-S1, which Dr. Hunsberger said was probably age related. Dr. Hunsberger said that the MRI was basically normal and there was nothing to make him believe claimant required surgery or immediate attention to his back.

Dr. Hunsberger last saw claimant on June 1, 2011. Claimant again complained of back pain over the low back area, but Dr. Hunsberger's examination was basically normal. Dr. Hunsberger believed that claimant's alleged accident may have caused an exacerbation of the underlying condition, but it was only temporary and claimant does not have any increased impairment. He did not believe claimant needed any permanent restrictions as a result of the alleged injury. Dr. Hunsberger reviewed a task list prepared by Dr. Robert Barnett.[1] After reviewing the list, Dr. Hunsberger opined claimant would have a 0% task loss and would be able to perform all the tasks on the list.

Dr. Hunsberger acknowledged that a July 13, 2011, MRI showed claimant had a healing compression fracture. Dr. Hunsberger agreed his opinion that claimant had no permanent impairment might be incomplete because he did not have all the medical

[1] Robert Barnett, Ph.D., a clinical psychologist and rehabilitation counselor, met with claimant on April 18, 2012, at the request of claimant's attorney. He identified a list of 10 job tasks claimant had performed in the 15-year period before the accident. Actually, a review of the task list shows there are only 9 job tasks on the list–there is no task no. 7.

records but still questioned whether claimant suffered a compression fracture from just bending over and feeling a pop in his back. He acknowledged that the finding of a compression fracture in an MRI would be an objective finding, and a compression fracture of a lumbar vertebrae would cause pain in the low back.

Dr. C. Reiff Brown, a board certified orthopedic surgeon, examined claimant on February 2, 2012, at the request of claimant's attorney. Claimant gave a history of bending over to cut an animal hanging from an overhead conveyor. When claimant made the cut, the animal lunged sideways, knocking claimant against a wall. Claimant told Dr. Brown about having some discomfort at the time, but it was not until the next day he had severe pain in the low back. Claimant was seen by Dr. Hunsberger, who sent claimant to physical therapy, prescribed medications, and obtained an MRI scan. Dr. Hunsberger then referred claimant to Dr. Britton, who suggested surgery and other diagnostic studies, which claimant declined.

Claimant told Dr. Brown he continued to have pain in the low back extending into the right thigh, calf and the sole of the foot. He has intermittent numbness. Claimant had weakness and giving way of his leg and had fallen on several occasions because of the weakness. Claimant denied any difficulty with his low back before the April 7, 2011, injury. Dr. Brown examined claimant and found tenderness in the low back extending into the area of the right sacroiliac and gluteosacral area. Claimant had limited range of motion in the lumbar spine with moderate muscle spasm in the lumbar paraspinal musculature. The sciatic nerve stress tests administered by Dr. Brown were positive. There was an increased sensory perception in the same distribution. Claimant could do the toe/heel walking, but complained of a feeling of weakness. The reflexes in claimant's lower extremities were absent. Dr. Brown stated the examination was some time after claimant's injury, and "it was kind of unusual to see evidence of acute injury at that point in time. It indicated that healing was still in progress."[2]

Dr. Brown diagnosed claimant with degenerative disc disease at L4-5 and L5-S1. Claimant had some elements of foraminal stenosis and facet arthrosis and mild bulging of discs. Dr. Brown stated there was a causal connection between claimant's work conditions and the resulting accident. He believed claimant would benefit from additional diagnostic studies and treatment. However, assuming no additional medical treatment was necessary, Dr. Brown would place claimant in AMA *Guides*[3] DRE Lumbosacral Category III with a 10% whole body impairment. Dr. Brown would opine that claimant could do light and possibly moderate work activity if claimant's acute symptoms settled down subsequent to the examination. He recommended claimant avoid lifting above 40 pounds occasionally

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[2] Brown Depo. at 8.

[3] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

and 20 pounds frequently, perform all lifting utilizing proper body mechanics, avoid work that involves frequent flexion or rotation of the lumbar spine greater than 30 degrees, and do no lifting from levels below the knees. Dr. Brown reviewed a task list prepared by Dr. Robert Barnett. Of the 9 nonduplicative tasks on the list, Dr. Brown opined that claimant is able to perform 3, for a 67% task loss.

Dr. Brown said that the work accident as described by claimant in his testimony was the cause of the injury. Dr. Brown did not think claimant's injury caused a change in the physical structure of claimant's spine but believed the injury aggravated a preexisting degenerative process. Dr. Brown did not believe claimant hitting the wall caused the aggravation of claimant's preexisting condition, rather it was caused by the movement of the spine in assuming a flexed position or starting to straighten up from a flexed position. Dr. Brown believes claimant's compression fracture happened in the course of daily living.

Dr. Vito Carabetta is board certified in physical medicine and rehabilitation. He performed an independent medical examination of claimant on March 30, 2012, at the request of the ALJ. Claimant gave a history of being struck in the chest by a carcass and being pushed into a wall. Dr. Carabetta's report does not include a statement that claimant bent over and felt a pull in his back. Claimant said he felt immediate low back pain which was markedly worse the next day. Claimant's chief complaint was low back pain with symptoms radiating down both lower extremities. He complained of an aching pain beginning in the thoracolumbar region continuing to the lumbosacral area and said the symptoms were constant and unimproved since the accident.

Dr. Carabetta found claimant had normal mobility in lumbar extension. Claimant's left and right lateral flexion was normal, although there was some discomfort with left lateral flexion. The straight leg test was negative. Claimant's was able to heel and toe walk without difficulty. Dr. Carabetta said the results of the heel/toe walking test showed claimant was not compromised neurologically.

Dr. Carabetta confirmed claimant had a fractured vertebrae, which can give a false signal down both sides. Dr. Carabetta testified that claimant's complaints have persisted longer than he would have expected. Typically, when one has a compression fracture, there would be a "horrendous" amount of back pain.[4] Dr. Carabetta also described a "warm feeling" that occurs as a result of healing.[5] Dr. Carabetta testified that the nerve fibers on the outer part of the vertebral body start to get irritated as the vertebra is attempting to heal, and there is swelling and irritation which sends a false signal that spreads down into the limbs, in claimant's case, the legs. Usually those symptoms start around the third or fourth month and continue about six months at the most. Dr. Carabetta

[4] Carabetta Depo. at 9.

[5] *Id.* at 10.

said claimant's pain would have been worse the day after the compression fracture than on the day of the fracture because swelling and inflammation would have occurred.

Dr. Carabetta said the May 2011 MRI showed claimant had a hemangioma, a normal/abnormal collection of blood vessels within the vertebral body, which means that vertebra was slightly weaker than the one above and below. Dr. Carabetta said it would have made the vertebra easier to fracture. Dr. Carabetta believed claimant's compression fracture resulted from the sudden acceleration of the torso that occurred when he hit the wall and the body suddenly snapped forward.

Dr. Carabetta said it was not possible to know how old the compression fracture was from reading the MRI report. Dr. Carabetta said there is no way to tell if the compression fracture was the result of claimant hitting the wall or whether it was caused from bending over. But he said a compression fracture would not likely be the result of a chronic degenerative process in a person claimant's age. Dr. Carabetta said the radiologist who reviewed the July 14, 2011, MRI opined that claimant had a recent occurred trauma. Dr. Britton, an orthopedic doctor, looked at the July 14, 2011, MRI and indicated the compression fracture was acute and discussed with claimant a kyphoplasty. Dr. Carabetta stated that he believes within a reasonable degree of medical certainty that claimant's compression fracture was the result of the alleged work injury.

Based on the AMA *Guides*, Dr. Carabetta placed claimant in DRE Category II for a 5% permanent partial impairment of the whole body and opined claimant should have conservative care in the form of medication. Dr. Carabetta said claimant's maximum occasional lifting should not exceed 20 pounds with more frequent lifting or carrying of no more than 10 pounds. Clamant should only occasionally participate in any bending or stooping activities. Dr. Carabetta reviewed Dr. Barnett's task list and testified that of the nine tasks listed, claimant was able to perform three for a 67% task loss. On cross-examination, Dr. Carabetta said claimant would be able to perform tasks Nos. 6 and 10 because the tasks involved leaning forward from a sitting position rather than bending in a standing position. This would change Dr. Carabetta's opinion about claimant's percentage of task loss from 67% to 44%, since claimant would be able to perform five out of the nine tasks listed.

Claimant was asked by respondent's attorney about previous complaints of low back pain. Claimant denied having pain in the low back in December 2006 when he went to the emergency room; he only complained of bilateral shoulder pain. He denied having physical therapy for back pain after the emergency room visit in December and testified he went to therapy for his hands. Greg Bachman, a physical therapist, testified he provided treatment to claimant beginning January 2, 2007. Claimant was referred to him by a physician on December 28, 2006, after he had been diagnosed with a strain of the left shoulder and a strain of the lumbar spine. Mr. Bachman examined claimant and noted low back pain extending into the right thigh. Claimant's range of motion of the lumbar spine was less than normal in both flexion and extension. Mr. Bachman saw claimant on five occasions.

By the fourth visit, claimant reported a significant improvement, and Mr. Bachman began him on an exercise program. On claimant's last visit, Mr. Bachman provided him with a written home exercise program and discontinued services. At the time claimant was dismissed, his lumbar flexion was normal and lumbar extension was a little less than normal.

Claimant was arrested on September 2, 2011, while traveling from Garden City to Emporia. Claimant alleged he was mistaken for someone else because of identity theft. Claimant spent 30 days in jail. After the jail term, claimant went to the emergency room complaining of back pain. Claimant testified the beds at the jail were too hard and he had increased back pain while he was in jail. Claimant was terminated by respondent because of work he missed while in jail. He continued to be out of work as of the regular hearing and had a 100% wage loss.

Claimant continues to have pain in both legs and has trouble ascending and descending stairs. He can only walk about three blocks before he has to stop. Claimant can only stand about 30 minutes before he has to sit or move around. He has pain in the low back every day, which he rates at a 9 on a scale of 1 to 10. He wears a back brace to minimize the pain and for back support. Claimant stated he occasionally uses a cane.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[6] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[7]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

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[6] K.S.A. 2010 Supp. 44-501(a).

[7] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[8]

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[9] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[10] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[11]

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

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[8] *Id.* at 278.

[9] *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 257 P.3d 255 (2011); *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[10] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[11] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997); *Claphan v. Great Bend Manor*, 5 Kan. App. 2d 47, 611 P.2d 180, *rev. denied* 228 Kan. 806 (1980).

ANALYSIS

1. Did claimant suffer an accidental injury arising out of and in the course of his employment?

There are differing versions in the record about how claimant was injured and when he developed pain. At the regular hearing, claimant testified that a cow kicked him in the chest and threw him against a wall on April 7, 2011. Ida Aguilera, the plant nurse, was the first healthcare provider who examined claimant after the alleged injury. She saw claimant on April 12, 2011, five days after the alleged injury. Ms. Aguilera is fluent in Spanish and completed the injury form. She testified that claimant reported to her that he felt a pull in his lower back while performing his job duties.

Dr. Hunsberger, the first physician to examine claimant, recorded that claimant bent over and felt a pop in his back. Dr. Hunsberger stated that claimant said the pain did not start for three days. Dr. Hunsberger also testified claimant did not mention he had been kicked by a cow. Dr. Hunsberger had treated claimant for being kicked by a cow on two prior occasions, in 2009 and 2010. Dr. Hunsberger, the respondent's orthopedic physician, testified that claimant's alleged injury may have caused an exacerbation of his underlying condition.

Dr. Brown recorded a history of claimant being knocked against a wall by a cow. Claimant told Dr. Brown that he had some discomfort at the time but did not have severe pain in his low back until the next day.

The ALJ ordered the claimant to be evaluated by Dr. Carabetta. Dr. Carabetta recorded a history that claimant felt immediate low back pain which was markedly worse the next day. Dr. Carabetta was appointed to perform an evaluation to determine if claimant's complaints were related to the alleged accident and to provide an impairment rating if claimant had reached maximum medical improvement. Dr. Carabetta diagnosed an L2 vertebral compression fracture and provided an impairment rating of 5% to the body as a whole. Dr. Carabetta found the entire impairment attributable to the claimant's work-related injury.

Dr. Carabetta believed claimant's compression fracture resulted from the sudden acceleration of his torso that occurred when he hit the wall and his body suddenly snapped forward. Dr. Carabetta's testimony supported claimant's description of the pain getting worse the day after the accident due to the swelling and inflammation that would have occurred. Dr. Carabetta also stated that the compression fracture was acute when claimant saw Dr. Britton in July 2011, which is consistent with claimant fracturing the vertebrae by hitting a wall three months prior. Dr. Carabetta added that the combination of claimant hitting the wall and then bending forward was capable of causing the fracture.

Respondent asks the Board to find that claimant is not a credible person and bases at least part of its defense on the credibility issue. The Board has, in the past, given some deference to an administrative law judge's opportunity to observe the live testimony of witnesses. That opportunity allows the administrative law judge to assess the credibility of those witnesses and decide the issues accordingly. The ALJ found claimant's testimony to be credible. The Board agrees.

The predominate history, based upon the record as a whole, is that claimant was kicked or pushed by a cow. In the process of bending over and back up, or reaching, claimant felt a pop in his back. Based upon the available medical testimony, the Board finds that claimant suffered an injury by accident arising out of and in the course of his employment with respondent on April 7, 2011.

2. Did claimant provide timely notice of accident

Ida Aguilera testified that claimant first met with her on April 12, 2011, and reported an injury on April 7, 2011. Claimant completed an injury/illness form with the respondent on April 18, 2011. K.S.A. 44-520 requires an injured employee to provide notice within ten days of the date of an injury. Claimant reported the injury to Ms. Aguilera, the plant registered nurse, within five days. Nothing in the record suggests that Mr. Aguilera is not the person to whom notice of injury is to be given by employees. Ms. Aguilera's signature appears at the bottom the employer's notice of injury form.

The Board finds that notice of accident was given within ten days as required by the Act.

3. What is the nature and extent of claimant's disability.

a. Functional Impairment

The record contains two impairment ratings. Dr. Brown assessed a 10% whole body impairment based upon signs of radiculopathy, which he testified were confirmed with a straight leg raising test. Dr. Britton, whose report was proffered at Dr. Hunsberger's deposition, also recorded negative straight leg raising tests. Dr. Carabetta's straight leg raising tests were normal in both the seated and supine position.

Dr. Carabetta provided a 5% impairment for a limited vertebral compression factor verified by objective testing. The Board finds this to be a more credible reflection of claimant's permanent impairment. The Board finds that claimant suffers from a 5% permanent impairment to the body as a whole as the result of the work-related injury.

b. Wage loss

Claimant was terminated by respondent and last worked on September 20, 2011. Claimant has not been substantially and gainfully employed since that time. As such, the Board finds claimant has a 100% wage loss beginning September 21, 2011, forward.

c. Task Loss

Dr. Barnett prepared a task list containing nine nonduplicative tasks. There is some testimony reflecting the list contained ten tasks. However, a review of the task list shows that Dr. Barnett skipped from six to eight when preparing the list. Dr. Barnett's task list was admitted into the record without objection and is deemed reliable by the Board to the extent that the list contains only nine tasks.

Dr. Hunsberger testified that claimant would be able to perform all the tasks on the list resulting in a 0% task loss. As improbable as Dr. Hunsberger's task loss seems, his opinions were not challenged by claimant. Dr. Brown testified that claimant is able to perform task numbers one, five and nine, three of the nine tasks, which is a 67% task loss.

Dr. Carabetta initially assessed a 67% task loss designated by his initials on the task list placed into the record as an exhibit in his deposition. He testified that claimant would be able to perform two additional tasks, numbers six and ten, that he did not identify by his initials on the list. Dr. Carabetta's opinion that claimant could perform five of the nine tasks results in a 44% task loss.

The Board finds each physician's opinions regarding task loss to be credible. An average of the three task loss opinions results in a 37% task loss.

d. Work Disability

The Board averages a 37% task loss and a 100% wage loss to find a 68.5% work disability. The ALJ erred in applying a credit for unemployment benefits that were paid to claimant during a time period from May 1, 2012, to June 12, 2012. There is nothing in the Kansas Workers Compensation Act that allows a credit for the payment of unemployment benefits, except to the extent that K.S.A. 2011 Supp. 44-510c(b)(4) states an employee may not receive temporary total benefits while receiving unemployment benefits. This section does not apply because: (1) claimant was not eligible for unemployment and temporary total at the same time, and (2) this section did not take effect until May 15, 2011, after the claimant's injury occurred.

CONCLUSION

Based upon the foregoing, the Board finds:

1. That claimant suffered an injury by accident arising in the course of his employment with respondent on April 7, 2011;

2. that notice of accident was given within ten days as required by the Act;

3. that claimant suffers from a 5% functional impairment to the body as a whole as the result of his work-related injuries; and,

4. that claimant has a 68.5% work disability commencing September 21, 2011.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated September 26, 2012, is modified to reflect the findings above. The Award is affirmed in all other respects.

Claimant is entitled to 20.75 weeks of permanent partial disability compensation at the rate of $385.30 per week or $7,994.98 for a 5% functional disability followed by permanent partial disability compensation at the rate of $430.83 per week not to exceed $100,000 for a 68.5% work disability.

As of March 14, 2013, there would be due and owing to the claimant 20.75 weeks of permanent partial disability compensation at the rate of $385.30 per week in the sum of $7,994.98 plus 77.29 weeks of permanent partial disability compensation at the rate of $430.83 per week in the sum of $33,298.85 for a total due and owing of $41,293.83, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $58,706.17 shall be paid at the rate of $430.83 per week until fully paid or until further order from the Director.

IT IS SO ORDERED.

Dated this _____ day of March, 2013.

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BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

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Pamela J. Fuller, Administrative Law Judge